LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 15 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1952.**

**No. 40.**

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

*Petitioner,*

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

*Respondent.*

## RESPONDENT'S BRIEF.

EDWARD R. BRUMLEY,
*Counsel for Respondent,*
Room 3841, Grand Central Terminal,
New York City.

ROBERT M. PEET,
*Of Counsel.*

THE COURT PRESS, N. Y. C.

# INDEX.


| | PAGE |
|---|---|
| Opinions of the Courts Below | 1 |
| Jurisdiction | 1 |
| Question Presented | 2 |
| Statutes Involved | 2 |
| Statement of the Case | 2 |
| Argument: | |
| POINT I—Respondent made a proper motion under Rule 50(b) which allowed the Court of Appeals to order judgment in its favor | 5 |
| POINT II—Even in the absence of a motion under Rule 50(b) after the verdict, the trial court's reservation of decision on respondent's motion for a directed verdict made prior to the verdict gave the Court of Appeals authority to order judgment for respondent | 8 |
| Conclusion | 19 |
| Appendix | 21 |


TABLE OF CASES CITED:


| | |
|---|---|
| *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937) | 14 |
| *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935) | 14, 17, 18 |
| *Berry* v. *United States*, 111 F. 2d 615 (C. C. A. 2, 1940) | 15 |
| *Binder* v. *Commercial Travelers Mut. Acc. Ass'n*, 165 F. 2d 896 (C. C. A. 2, 1947) | 6 |
| *Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321 (C. C. A. 10, 1944) | 12 |

PAGE

*Colonna* v. *Merchants & Miners Transportation Co.*, 112 Fed. 2d 612 (C. C. A. 4, 1940) ..... 12

*Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947) ..... 15, 17, 18

*Conway* v. *O'Brien*, 111 F. 2d 611 (C. C. A. 2, 1940) .. 15

*Cruz* v. *New York*, 179 Misc. 1031, 43 N. Y. S. 2d 665 (1943) ..... 16

*Dougherty* v. *Salt*, 227 N. Y. 200 (1919) ..... 16

*Eastern Livestock Co-op. M. Ass'n* v. *Dickenson*, 107 F. 2d 116 (C. C. A. 4, 1939) ..... 15

*Evans* v. *Teche Lines, Inc.*, 112 F. 2d 933 (C. C. A. 5, 1940) ..... 12

*Fleming* v. *Harrison*, 162 F. 2d 789 (C. C. A. 8, 1947) ..... 7

*Fratta* v. *Grace Line, Inc.*, 139 F. 2d 743 (C. C. A. 2, 1943) ..... 11

*Garman* v. *Metropolitan Life Insurance Co.*, 175 F. 2d 24 (C. C. A. 3, 1949) ..... 16

*Gillis* v. *Reicks*, 7 F. R. D. 205 (D. D. C., 1947) ..... 7

*Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948) 16

*Howard University* v. *Cassell*, 126 F. 2d 6 (App. D. C., 1941), cert. den. 316 U. S. 675 ..... 15

*International Shoe Co.* v. *Cool*, 154 F. 2d 778 (C. C. A. 8, 1946), cert. den. 329 U. S. 726 ..... 12

*Jaggers* v. *Southeastern Greyhound Lines*, 126 F. 2d 762 (C. C. A. 6, 1942) ..... 13

*Kline* v. *Yokom*, 117 F. 2d 370 (C. C. A. 7, 1941) ..... 9

*Limbershaft Sales Corp.* v. *A. G. Spalding & Bros.*, 111 F. 2d 675 (C. C. A. 2, 1940) ..... 8

*Lowden* v. *Bell*, 138 F. 2d 558 (C. C. A. 8, 1943) 15

*Lowden* v. *Denton*, 110 F. 2d 274 (C. C. A. 8, 1940), cert. den. 310 U. S. 652 ..... 15

PAGE

*Lux* v. *Western Casualty Co.*, 107 F. 2d 1002 (C. C. A. 5, 1939) ..... 9

*Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243 (1940) ..... 6, 12, 17

*Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951) ..... 6

*Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 11 F. R. D. 348 (N. D. Ill., 1950), modified 191 F. 2d 82 (7th Cir., 1951), cert. den. 342 U. S. 888, 9, 10, 11

*Northern R. Co.* v. *Page*, 274 U. S. 65 (1927) ..... 13

*Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913) ..... 13, 14

*Sykes* v. *Bensinger Recreation Corp.*, 39 F. Supp. 952 (E. D. Wis., 1941) ..... 13

*United States* v. *Halliday*, 116 F. 2d 812 (C. C. A. 4, 1941) ..... 15

*Western Union Telegraph Co.* v. *Dismang*, 106 F. 2d 362 (C. C. A. 10, 1939) ..... 8

*West Virginia Pulp & Paper Co.* v. *Cone*, 153 F. 2d 576 (C. C. A. 4, 1946) ..... 15

*Young* v. *John McShain, Inc.*, 130 F. 2d 31 (C. C. A. 4, 1942) ..... 12

OTHER AUTHORITIES CITED:

38 A. B. A. Rep. 541, 561-568 (1913) ..... 13

Advisory Committee on the Rules of Civil Procedure, 1946 Report of Proposed Amendments to the Rules ..... 18

47 Am. L. Rev. 906 (1913); Comment ..... 13

Civil Practice Act, Section 457-a ..... 16

Clark and Moore, *A New Federal Procedure*, 44 Yale L. J. 387, 407-408 (1935) ..... 18

PAGE

13 Col. L. Rev. 544 (1913), Case Note ..... 13

47 Col. L. Rev. 1077 (1947), Note, *Restricted Power of Federal Appellate Courts to Order Judgment Notwithstanding Verdict* ..... 16

Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c:

Rule 50 ..... 2, 21

Rule 50(a) ..... 21

Rule 50(b) ..... 5, 6, 7, 8, 9, 14, 16, 17, 18, 20, 21, 22

Rule 59 ..... 2, 17, 22

26 Green Bag 106 (1914), Comment ..... 13

26 Har. L. Rev. 738 (1913), Comment ..... 13

61 Har. L. Rev. 889 (1948), Case Note ..... 16

Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 Minn. L. Rev. 1, 18 (1939) ..... 18

Jones Act, 46 U. S. C. §688 ..... 1

34 Mich. L. Rev. 93 (1935), Comment ..... 18

Moore, *Federal Practice*, Volume 5 (2nd ed., 1951):

Page 2331, n. 5 ..... 14

Page 2338 ..... 16

Scott, *The Reform of Civil Procedure*, 31 Har. L. Rev. 669, 688-689 (1918) ..... 13

Simkins, *Federal Practice*, §637, p. 484 (3rd ed., Schweppe, 1938) ..... 14

Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 587-601 (1915) ..... 13

Thorndyke, *Trial by Jury in the United States*, 26 Har. L. Rev. 732 (1913) ..... 13

28 U. S. C. §1254(1) ..... 2

23 Yale L. J. 454, 455-459 (1914), Comment ..... 13

IN THE

# Supreme Court of the United States.

**OCTOBER TERM, 1952.**

**No. 40.**

---

MARGARET JOHNSON, as Administratrix of the goods, chattels and credits of Charles Johnson, deceased,

*Petitioner,*

—against—

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

*Respondent.*

---

## RESPONDENT'S BRIEF.

### Opinions of the Courts Below.

The opinion of Judge Abruzzo of the United States District Court for the Eastern District of New York is not officially reported but appears in the record on appeal at pages 159 to 164.

The opinion of the United States Court of Appeals for the Second Circuit written by Judge Swan is officially reported in 194 F. 2d 194 and appears at the end of the record on appeal at pages 171 to 175.

### Jurisdiction.

This action to recover damages for the death of Charles Johnson on April 22, 1946 was presumably brought under the Jones Act, 46 U. S. C. §688 (R. 4-6, 162). Jurisdiction

of this Court under 28 U. S. C. §1254(1) is alleged. The judgment of the Court of Appeals was rendered on February 4, 1952 (R. 176). Petition for writ of certiorari was filed on April 22, 1952. Certiorari limited to a review of the procedural issue only and placing the case on the summary docket was granted on June 9, 1952 (R. 177).

## Question Presented.

Petitioner has not accurately stated the issue before this Court. The true question presented is: Did the Court of Appeals for the Second Circuit have authority to reverse the judgment for petitioner and order judgment for respondent on the ground that petitioner's failure to prove causal connection between the asserted negligence and the death required that respondent's motion for a directed verdict made at the close of all the evidence should have been granted, where the trial judge expressly reserved decision on this motion and also on all but the last ground of respondent's post-verdict motion to set aside the verdict as contrary to the law, contrary to the evidence, contrary to the weight of the evidence and excessive?

## Statutes Involved.

Rules 50 and 59 of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, are set forth in an Appendix.

## Statement of the Case.

Part of petitioner's brief (pp. 3-10) is devoted to arguing the merits of the Court of Appeals' decision that there was no proof of causal connection between the asserted negligence and the death. Because certiorari as granted was limited to the procedural issue only, respondent does

not here attempt to answer the arguments or correct the omissions and misleading impressions of this portion of petitioner's brief. Respondent will set forth here only what procedural steps were taken at the trial and upon the subsequent appeal, and such underlying facts as are necessary to understand the procedural issue.

Petitioner's opening statement made to the jury on April 10, 1951, failed to list even one item of negligence, and was deemed by the trial court to be very faulty (R. 38). Right after the opening statements to the jury, petitioner moved to amend her complaint, pursuant to a notice to amend served on respondent on March 6, 1951, so as to allege as an additional ground of negligence respondent's failure to exercise reasonable care to rescue Charles Johnson after his absence became known (R. 8-9). This motion was granted (R. 9). The complaint prior to this amendment had alleged as negligence (1) careless operation of the tug in removing the carfloats, (2) failure to give Johnson a reasonable opportunity to remount the carfloat, (3) failure to furnish a safe and secure place in which to work, and (4) starting the tug in such a manner as to precipitate Johnson into the river.

During the examination of the first witness in the trial, petitioner attempted to bring out the presence of oil on "Carfloat 53" (R. 38). The trial judge ruled that it was then too late to inject into the case for the first time a claim of negligence based on the presence of oil, but offered to allow petitioner to amend her complaint to make such a claim and to try her case before a new jury a month later (R. 38-39). Petitioner decided not to take advantage of this offer (R. 39).

At the close of petitioner's case, respondent moved to dismiss the complaint for failure to prove negligence, for failure to make out a *prima facie* case, and for failure to put in sufficient proof (R. 102). The trial judge re-

served decision on the motion (R. 105). He indicated at that time that the only issue he intended to submit to the jury was the one based on the expert's testimony as to the practice of not pulling out from the pier until the floatman was known to be safely aboard, and petitioner stated that no exception was being taken to this (R. 104).

At the close of all the evidence respondent renewed its earlier motion to dismiss the complaint on the same grounds, and also moved for a directed verdict in its favor on the same grounds and for failure to prove negligence and because Johnson was responsible for his own death (R. 133). The trial judge reserved decision (R. 134). He then again outlined the limited issue which he intended to submit to the jury, barring all theories of negligence based on failure to rescue Johnson, to which petitioner took exception (R. 133-135).

After a verdict for $20,000 in favor of petitioner was rendered on April 13th, respondent moved at once to set it aside as contrary to the law, contrary to the evidence, contrary to the weight of the evidence and excessive (R. 145). The trial judge denied that part of the motion based on excessiveness, but called for the parties to submit briefs as to the rest of the motion after receipt of the transcribed minutes of the trial but by May 21st (R. 145). After exchange of main briefs, two days was allowed for reply briefs (R. 145-146). Judgment on the verdict was ordered to be entered (R. 145).

Respondent served on petitioner a brief in which it urged among other things that petitioner had failed to prove any causal connection between the alleged negligence and the death, and this issue was also discussed in petitioner's brief.

The trial judge wrote an opinion dated June 20th rejecting respondent's contentions, denying its motion, and

allowing the verdict to stand (R. 159-164). Thereafter on June 29th he signed an order reciting the history of the motions set forth above and denying them (R. 164-165).

On appeal to the Court of Appeals, respondent urged the same grounds for reversal as it had in the District Court. The Court of Appeals unanimously concluded that no causal connection between the alleged negligence and the death had been proven, and that respondent's motion for a directed verdict should have been granted (R. 171-175). Accordingly, judgment for petitioner was reversed and mandate in accordance with the decree was ordered issued to the District Court (R. 176).

This Court granted certiorari limited to a review of the issue raised as to the application of Rule 50(b) of the Rules of Civil Procedure (R. 177).

## ARGUMENT

### POINT I

**Respondent made a proper motion under Rule 50(b) which allowed the Court of Appeals to order judgment in its favor.**

Petitioner's entire argument is based on the misconception that respondent made no motion under Rule 50(b) after the verdict. Petitioner concedes (Brief, pp. 17, 26) that if such a motion was made, the disposition of the case made by the Court of Appeals is not open to challenge. Petitioner's concession in this respect follows the most recent practice recognized by this Court as correct.

*Moore* v. *Chesapeake & Ohio R. Co.*, 340 U. S. 573 (1951).

See:

*Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254 (1940).

The motion made by respondent after the verdict was brought in against it was intended to be a motion for judgment in its favor or for a new trial. Rule 50(b) allows these two motions to be combined. No objection as to the adequacy of the motion was raised either by the District Court or by the Court of Appeals, both of which were presumably familiar with the earlier decisions of this Court on the subject, or even by petitioner until she sought certiorari.

That part of respondent's motion which sought to set aside the verdict as contrary to the law and the evidence was the equivalent of a motion for judgment for respondent under Rule 50(b) and was apparently so treated by the trial judge. His exercise of discretion in this respect is not reviewable here.

*Cf. Binder* v. *Commercial Travelers Mut. Acc. Ass'n*, 165 F. 2d 896 (C. C. A. 2, 1947), where the Court of Appeals accepted the interpretation of the District Court that a motion by defendant to set aside the verdict and for a directed verdict constituted also a motion for a new trial even though the motion did not specifically mention any request for a new trial.

That part of respondent's motion which asked to set aside the verdict as contrary to the weight of the evidence and excessive was in effect a motion for a new trial on the specified grounds. There is no other reasonable way of interpreting the language used, particularly in the light of respondent's pre-verdict motions, which were still before the court as a result of its express reservation.

*Cf. Gillis* v. *Reicks*, 7 F. R. D. 205 (D. D. C., 1947), where the trial court held that the inclusion in support of a motion to set aside the verdict and for judgment notwithstanding the verdict of one ground appropriate only to a motion for a new trial gave authority to grant a new trial.

The points urged by both parties in their briefs to the trial judge were specifically directed toward his granting or not granting judgment for respondent. The same was true of their briefs in the Court of Appeals. Obviously respondent did not merely want the verdict to be set aside but wanted the relief that invariably follows such a setting aside on the grounds urged: a judgment in its favor or a new trial. Respondent, under reasonable rules of interpretation, was entitled to have its motion to set aside treated as an alternative motion under Rule 50(b) for judgment or a new trial.

Petitioner's objection (Brief, p. 11) that respondent failed to set forth the specific ground of lack of causal connection between the alleged negligence and the death in support of its motions overlooks the fact that the grounds urged were broad enough to include this one (R. 102, 133, 145) and that this very argument was discussed in the briefs on the motions submitted to the court by both parties. Moreover, petitioner's failure to object previously to the motions on this score prevents a review of the alleged error now.

*Fleming* v. *Harrison*, 162 F. 2d 789 (C. C. A. 8, 1947).

## POINT II.

**Even in the absence of a motion under Rule 50(b) after the verdict, the trial court's reservation of decision on respondent's motion for a directed verdict made prior to the verdict gave the Court of Appeals authority to order judgment for respondent.**

Respondent has set forth under its first Point the reasons why it believes this Court must accept its contention that a motion under Rule 50(b) was made after the verdict. Even if its contention in this respect were to be rejected, respondent will demonstrate in its second Point why the Court of Appeals had authority in the absence of a motion under Rule 50(b) to order judgment for respondent.

At the end of all the evidence respondent moved for a directed verdict in its favor (R. 133). The trial court reserved decision on this motion (R. 134). By order dated June 29, 1951, the court denied this motion (R. 164-165). The court had this motion under consideration from April 12, 1951 to June 29, 1951. The verdict was received on April 13, 1951 (R. 144-145). It would have been an act of supererogation for respondent, under these circumstances, within ten days after April 13, 1951, to have made a motion, as allowed by Rule 50(b), to have judgment entered in accordance with its motion for a directed verdict.

In *Limbershaft Sales Corp.* v. *A. G. Spalding & Bros.*, 111 F. 2d 675 (C. C. A. 2, 1940), the Court of Appeals held it had power to reverse and direct judgment of dismissal on the merits where the trial court had reserved decision on defendant's motion at the close of the evidence for a directed verdict. The Court of Appeals treated the case at bar in the same way.

Under similar circumstances, the same powers were exercised by the Courts of Appeals in *Western Union Telegraph Co.* v. *Dismang*, 106 F. 2d 362 (C. C. A. 10, 1939),

and in *Lux* v. *Western Casualty Co.*, 107 F. 2d 1002 (C. C. A. 5, 1939).

In *Kline* v. *Yokom*, 117 F. 2d 370 (C. C. A. 7, 1941), the defendant at the close of all the evidence made a written motion for a directed verdict. The trial judge reserved decision on the motion. More than ten days after the verdict, a hearing on the motion was held. At that time defendant presented his motion in amended form. The District Court granted the motion in its amended form. On appeal, as the briefs show, it was argued by plaintiff that in the absence of a proper motion under Rule 50(b) after the verdict, neither the trial nor the appellate court could grant defendant's motion for a directed verdict. This argument the Court of Appeals rejected by affirming the judgment for defendant.

In *Mullen* v. *Fitz Simons & Connell Dredge & Dock Co.*, 11 F. R. D. 348 (N. D. Ill., 1950), modified 191 F. 2d 82 (7th Cir., 1951), cert. den. 342 U. S. 888, the trial court reserved decision on a motion for a directed verdict made by defendant at the close of all the evidence with respect to plaintiff's three causes of action. After a verdict for plaintiff, the trial court set a date for oral argument on the reserved motion, heard argument on the date set, and granted the motion, even though defendant had made no post-verdict motion under Rule 50(b). The Court of Appeals affirmed as to the first cause of action and ordered a new trial as to the second and third causes of action. This Court refused to review the case. In support of its position, the trial court said (p. 350):

> "*Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654, indicates the desirability of lodging power in the trial judge to reserve motions for decision after he has had the benefit of argument. The parties benefit from considered disposition of reserved motions. The plaintiff's suggestion that the court may lose jurisdiction over the motion it has itself reserved unless one of the parties to the liti-

gation takes action of some kind is at variance with reason and practice.

"Nor, contrary to plaintiff's assertion, does Rule 50(b) lead to that result. The rule was framed to *extend* the application of the *Redman* case, *supra*. Expansion of the reservation device used by the court in the *Redman* case and in the case at bar was intended—not a contraction which would remove from the trial court the power to reserve and hear argument on its own initiative in the interest of the 'considered rulings' of which the court spoke in the *Redman* case. Nowhere in Rule 50(b) is there evidence of any intention to take from the court its power without any action by a party to reserve a motion at the end of all the evidence and later dispose of that motion after reception of a verdict.

"Plaintiff seems to disregard the facts and to assume that the motion in issue has arisen *after* reception of the verdict. His memorandum is directed to that assumption, as is evidenced by his reliance on *Southeastern Greyhound Lines* v. *McCafferty*, 169 F. (2d) 1, a case in which no motion was made before submission of the case to the jury and hence no reservation, actual or assumed, arose.

"But the situation and rule plaintiff argues is not involved in this case. Rule 50(b)'s provision for automatic reservation of a motion, with its sanction for timely action by the moving party after verdict, is not the source of the court's power to determine this motion. The motion at issue was made at the conclusion of all the evidence *before* a verdict was returned. The reservation was by the court. On the day following the return of the verdict, the court set the reserved motion for argument. This court has power to proceed as it has done in deciding the ruling to be made on a motion for a directed verdict. The motion on which defendant is relying is not the motion after verdict contemplated in Rule 50(b).

"The rule that plaintiff would borrow from Rule 50(b) to defeat a prerogative of the court which antedates the liberalizing Federal rules (*Baltimore & Carolina Line* v. *Redman, supra*) cannot be applied in this dissimilar situation—to a pending motion, seasonably made and reserved by the court, coming on for argument at the time set by the court. *Kline* v. *Yokam, supra.*"

It is perfectly clear that a trial judge has power to reserve decision on a motion for a directed verdict made at the close of all the evidence. It is equally clear that his disposition of such a reserved motion may be reviewed on appeal. See *Frattă* v. *Grace Line, Inc.*, 139 F. 2d 743, 744 (C. C. A. 2, 1943). No reason suggests itself why an appellate court upon such a review may not in its discretion, as a matter of law, finally dispose of such a case, where no alternative relief is requested and none is appropriate, instead of ordering a new trial. It has long been recognized that prolonging litigation and piling up court costs and attorney's fees is neither in the best interests of the courts, with their congested calendars, nor of the parties, who desire speedy, inexpensive relief. In passing on a reserved motion for a directed verdict, the trial judge may secure a thorough briefing of the issues and take time for full deliberation on the case. He can then, in a way he could not during the rush of a trial, exercise his judgment intelligently to grant or deny the motion or, if justice requires, to order a new trial.

Ordering a new trial in the case at bar or remanding the case to the District Court to determine whether a new trial should be granted would under the circumstances be both improper and futile. The trial court has already refused to allow petitioner, because of her laches and the resulting unfairness to respondent, to introduce a new concept of liability based on the presence of oil on one of the carfloats (R. 38). Petitioner did not even try

to amend her complaint to allow such proof when at the start of the trial she amended it to allege liability for failure to make timely rescue (R. 8-9), nor did she mention it in her opening to the jury (R. 38), and she refused to take a voluntary nonsuit and proceed to trial a month later with the complaint amended so as to allege the liability based on the presence of oil (R. 38-39). The trial court refused as a matter of law to submit to the jury petitioner's theory of liability based on failure to effect timely rescue, relying in part on *Colonna* v. *Merchants & Miners Transportation Co.*, 112 F. 2d 612 (C. C. A. 4, 1940) (R. 104, 133). No issue of fact on this question is available to be retried. The trial court has fully considered both these grounds for a retrial now urged by petitioner and rejected them. Petitioner did not cross-assign this rejection as error in the Court of Appeals, as it should have pursuant to this Court's dictum in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 254 (1940).

For the trial court to have ordered a voluntary dismissal, if one had been requested, at so late a stage in the proceedings as after the verdict would have been improper and might have constituted an abuse of its discretion.

*International Shoe Co.* v. *Cool*, 154 F. 2d 778 (C. C. A. 8, 1946), cert. den. 329 U. S. 726;
*Boaz* v. *Mutual Life Ins. Co. of New York*, 146 F. 2d 321 (C. C. A. 10, 1944);
*Young* v. *John McShain, Inc.*, 130 F. 2d 31 (C. C. A. 4, 1942);
*Evans* v. *Teche Lines, Inc.*, 112 F. 2d 933 (C. C. A. 5, 1940).

Respondent, for its part, does not now seek a retrial and did not ask for one from the Court of Appeals. The trial court has denied its motion for a new trial in refusing to set aside the verdict. The issue of causation has been

fully tried out; and the only living eye witnesses have testified. Petitioner clearly has no right to have it retried, nor would such a retrial serve any useful purpose.

*Cf. Sykes* v. *Bensinger Recreation Corp.*, 39 F. Supp. 952 (E. D. Wis., 1941);
*Jaggers* v. *Southeastern Greyhound Lines*, 126 F. 2d 762 (C. C. A. 6, 1942).

An analysis of the cases cited by petitioner in reviewing the historical development of the issue at bar reveals the soundness of respondent's position. The decision of this Court in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364 (1913), which set up a constitutional barrier to ordering a judgment notwithstanding the verdict where determination of the prior motion for a directed verdict had not been reserved, came as a great surprise to practitioners of that era. It was strongly attacked at the time by the four dissenting justices and by commentators.

Thorndyke, *Trial by Jury in the United States*, 26 Har. L. Rev. 732 (1913);
Thayer, *Judicial Administration*, 63 U. of Pa. L. Rev. 585, 587-601 (1915);
Scott, *The Reform of Civil Procedure*, 31 Har. L. Rev. 669, 688-689 (1918);
38 A. B. A. Rep. 541, 561-568 (1913);
Comment, 47 Am. L. Rev. 906 (1913);
Comment, 26 Har. L. Rev. 738 (1913);
Comment, 23 Yale L. J. 454, 455-459 (1914);
Comment, 26 Green Bag 106 (1914);
Case Note, 13 Col. L. Rev. 544 (1913).

This Court first departed from the rigidity apparently imposed by its decision in the *Slocum* case, *supra*, in *Northern R. Co.* v. *Page*, 274 U. S. 65 (1927), where it upheld the Massachusetts practice of submitting alternative verdicts to the jury and thereafter allowing the trial

or appellate court as a matter of law to order judgment for the party against whom the verdict was rendered.

The *Slocum* case decision was ultimately clarified and broadened considerably in *Baltimore & Carolina Line, Inc.* v. *Redman*, 295 U. S. 654 (1935), where this Court recognized the power of a federal judge at common law or under state practice to reserve decision on a motion for a directed verdict and after the verdict to grant or deny the reserved motion without its having been renewed, and also recognized the power of an appellate court to review this decision of the trial judge, and to grant or deny the motion if he should have done so.

In *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389 (1937), this Court in the first ground for its decision apparently reaffirmed the *Slocum* case, but is believed to have given indication in stating the second ground for its decision that the Pennsylvania practice of allowing a judgment notwithstanding the verdict even where no decision had been reserved on the earlier motion for a directed verdict would not be held unconstitutional.

Moore, *Federal Practice*, Vol. 5, p. 2331, n. 5 (2nd ed., 1951);
Simkins, *Federal Practice*, §637, p. 484 (3rd ed., Schweppe, 1938).

In order to be sure to allow a court constitutionally to act after the verdict on an earlier motion for a directed verdict which had been denied, the drafters of the new Federal Rules of Civil Procedure resorted to the fiction of a presumed reservation, so as to bring the situation within the doctrine of the *Redman* case. In order to get the trial judge to act on a motion for a directed verdict which he had already denied, the party whose motion had been denied was authorized to renew it. Nothing was said, however, in Rule 50(b) about the situation where

the trial judge specifically reserved decision on the motion for a directed verdict and consequently had it before him for action after the verdict without its being renewed.

After the adoption in 1938 of the new Federal Rules of Civil Procedure, it was widely assumed that a Court of Appeals had power to order judgment for the party which lost the verdict below even where no post-verdict motion for judgment in its favor had been made and decision had not been specifically reserved on its earlier motion for a directed verdict.

*Eastern Livestock Co-op. M. Ass'n* v. *Dickenson*, 107 F. 2d 116 (C. C. A. 4, 1939);
*Lowden* v. *Denton*, 110 F. 2d 274 (C. C. A. 8, 1940), cert. den. 310 U. S. 652;
*Conway* v. *O'Brien*, 111 F. 2d 611 (C. C. A. 2, 1940);
*Berry* v. *United States*, 111 F. 2d 615 (C. C. A. 2, 1940);
*United States* v. *Halliday*, 116 F. 2d 812 (C. C. A. 4, 1941);
*Howard University* v. *Cassell*, 126 F. 2d 6 (App. D. C., 1941), cert. den. 316 U. S. 675;
*Lowden* v. *Bell*, 138 F. 2d 558 (C. C. A. 8, 1943);
*West Virginia Pulp & Paper Co.* v. *Cone*, 153 F. 2d 576 (C. C. A. 4, 1946).

In the last-cited case, this Court reversed the Circuit Court of Appeals, and held that where decision had not been specifically reserved on defendant's motion for a directed verdict and where defendant had made no motion after the verdict except one for a new trial on the ground of freshly discovered evidence, judgment in his favor could not be ordered by the appellate court but only a new trial.

*Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212 (1947).

The power of appellate courts was further limited in *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571 (1948). There both sides in a jury trial moved for a directed verdict at the close of all the evidence, and the trial court then directed a verdict for plaintiff. The defendant's only motion thereafter was one for a new trial. The Circuit Court of Appeals ordered judgment for defendant, but this Court held that it could order only a new trial.

The restrictive nature of both these decisions has been commented upon by writers and courts.

Note, *Restricted Power of Federal Appellate Courts to Order Judgment Notwithstanding Verdict*, 47 Col. L. Rev. 1077 (1947);
Case Note, 61 Har. L. Rev. 889 (1948);
Moore, *Federal Practice*, Vol. 5, p. 2338 (2d ed., 1951);
*Garman* v. *Metropolitan Life Insurance Co.*, 175 F. 2d 24 (C. C. A. 3, 1949).

It is clear from the review of the cases made thus far that this Court has never decided the precise question here presented and that the Courts of Appeals for the Second, Fifth, Eighth and Tenth Circuits have decided this question in respondent's favor. The New York courts, even before Section 457-a of the Civil Practice Act was amended to its present form, had reached the same conclusion as these four Circuit Courts on the basis of similar reasoning.

*Cruz* v. *New York*, 179 Misc. 1031, 43 N. Y. S. 2d 665 (1943);
*Dougherty* v. *Salt*, 227 N. Y. 200 (1919).

Petitioner overlooks the permissive nature of the wording of Rule 50(b). It says that within ten days after the reception of a verdict a party who has moved for a

directed verdict "may", not "shall" or "must", move for judgment in accordance with his motion for a directed verdict. He "may" also join with this a motion for a new trial. He may instead make a separate motion under Rule 59 for a new trial.

Where a party's motion for a directed verdict has been denied, he will of course want to move after the verdict under Rule 50(b) to try to change the trial judge's mind and to compel him to resolve the issue. In fact, as appears from the *Cone* case, he must do so in order fully to protect his rights on appeal. But where decision has been specifically reserved on a party's motion for a directed verdict and argument or briefs requested, he need not uselessly repeat the motion already before the court unless he should desire to set forth further or more distinct grounds in support of his motion or unless he should desire to combine his earlier motion with one for a new trial, as allowed by Rule 50(b). If the act of reserving decision is to mean anything and is to avoid deceiving the attorneys and the court as to what it means, that act must give the court power after rendition of a verdict to set it aside and order judgment contrary to the verdict. The trial court in determining the reserved motion may at its leisure review all aspects of the case and grant whatever relief may be appropriate.

The enactment of Rule 50(b) did not take away from the courts their common law powers. As this Court said in *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250 (1940), Rule 50(b) "adds nothing of substance to rights of litigants heretofore existing and available through a more cumbersome procedure". The flexibility of action gained for the courts in the *Redman* case in handling cases where the only motion made is one at the close of all the evidence for a directed verdict on which decision has been specifically reserved, should not now be cast aside.

The Advisory Committee on the Rules of Civil Procedure in its 1946 Report of Proposed Amendments to the Rules sought to amend Rule 50(b) to make it clear that such power existed under Rule 50(b) without any post-verdict motion. It is not known whether this Court rejected the amendment because it believed it to be superfluous in view of its forthcoming decision in the *Cone* case, because it wished to consider the question further after increased experience, because it was opposed to such a change, or because it had some other reason in mind. From the decisions already referred to, it would appear that the Courts of Appeals, regardless of any change in Rule 50(b), would welcome a reaffirmation of the fact that they still have the power which the *Redman* case recognized in them. The commentators mentioned above favor this result too. Note also:

Clark and Moore, *A New Federal Procedure*, 44 Yale L. J. 387, 407-408 (1935);

Ilsen and Hone, *Federal Appellate Practice as Affected by the New Rules of Civil Procedure*, 24 Minn. L. Rev. 1, 18 (1939);

Comment, 34 Mich. L. Rev. 93 (1935).

But even without the alteration sought by the Advisory Committee in Rule 50(b), the trial court has power independent of Rule 50(b) under a specific reservation to grant a directed verdict without the motion having been renewed after the verdict. To grant it the power to act in the one case but not in the other would be to create a distinction in form where none exists in substance. In each case the same motion raising the same points of law is before the trial court at the same time. The only differenee lies in the mechanics by which the two motions are brought before the court: in one case by its own specific reservation and in the other case through the renewal by a party of its earlier denied motion. In each case the party which won the verdict is

fully aware that the motion is pending before the court and may take whatever steps seem desirable in the way of argument, briefing, or motions to protect against a subsequent adverse ruling by the trial or appellate court. In each case the trial court has ample time for such argument, briefing and mature deliberation as the matter calls for, and may award whatever relief justice between the parties appears to require. Since both motions are for all material purposes similar, an appellate court should have power to treat them in the same way.

## CONCLUSION.

**It is urged that the judgment of the Court of Appeals for the Second Circuit should be affirmed.**

Respectfully submitted,

EDWARD R. BRUMLEY,
*Counsel for Respondent.*

ROBERT M. PEET,
*Of Counsel.*

## APPENDIX.

Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c.

"RULE 50.

*Motion for a Directed Verdict.*

(a) *When Made: Effect.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor.

(b) *Reservation of Decision on Motion.* Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment

as if the requested verdict had been directed or may order a new trial."

"RULE 59.

*New Trials; Amendment of Judgments.*

(a) *Grounds.* A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) *Time for Motion.* A motion for a new trial shall be served not later than 10 days after the entry of the judgment.

(c) *Time for Serving Affidavits.* When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) *On Initiative of Court.* Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.

(e) *Motion to Alter or Amend a Judgment.* A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."